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13 **UNITED STATES BANKRUPTCY COURT**
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15 **NORTHERN DISTRICT OF CALIFORNIA**
16
17 **SAN FRANCISCO DIVISION**

18 In re

19 Case No. 20-30819 DM

20 BENJA INCORPORATED

21 Chapter 11

22 Debtor.

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28 **TRUSTEE'S EX PARTE
APPLICATION FOR AN ORDER
PURSUANT TO RULE 2004 FOR
PRODUCTION OF DOCUMENTS
AND EXAMINATION OF BRETT
BUERCK**

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20 **TO THE HON. DENNIS MONTAL AND ALL INTERESTED PARTIES:**

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28 KYLE EVERETT, Chapter 11 Trustee (the "Trustee") in this matter, submits this application pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "Application") for entry of an order authorizing the examination of Brett Buerck ("Buerck") via videoconference or any other method agreed to by the Trustee and Buerck, and the production of documents as described in Exhibit A prior to the examination. As the Trustee has a pending motion to convert this case to a Chapter 7, this application and the related order shall provide authority for the Trustee or the Chapter 7 trustee to conduct the examination.

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30 **Background:**

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32 The Debtor filed a voluntary Chapter 11 on October 15, 2020. The Court granted the motion of Busey Bank for appointment of a Chapter 11 on October 26, 2020. The Office of the

1 U.S. Trustee sought the appoint of Kyle Everett as the Chapter 11 Trustee and the Court
2 approved the appointment of Mr. Everett on November 3, 2020. Since his appointment, the
3 Trustee has been investigating Debtor's affairs, though his investigation has been slowed by the
4 fact that Debtor's principal, Andrew Chapin, was arrested and charged with various federal
5 offenses and has been unwilling to provide information to the Trustee.

6 The Trustee wishes to obtain documents from Buerck and examine him based on the
7 fact that Buerck or a related entity (Taco Corporation of America) received a series of large
8 payments from the Debtor within 18 months prior to Debtor's bankruptcy filing.

9 **Legal Argument:**

10 Rule 2004(a) of the Bankruptcy Rules states that upon a motion of any party in
11 interest, "the court may order the examination of any entity." Rule 2004(c) in turn allows for
12 the production of documents. Rule 2004-1 of the Bankruptcy Local Rules for the United States
13 District Court for the Northern District of California allows for the Court Clerk to issue an
14 order granting an application for examination of a witness pursuant to Rule 2004(a).

15 The scope of a Rule 2004 examination "is 'unfettered and broad,' and the rule itself
16 is 'one of the peculiar characteristics of bankruptcy law and procedure because it affords few of
17 the procedural safeguards that an examination under Rule 26 of the Federal Rules of Civil
18 Procedure does.'" 9 King, *Collier on Bankruptcy*, Examination, ¶ 2004.02[1] (15th ed. rev.
19 1998) (quoting *In re Mittco, Inc.*, 44 B.R. 35, 36 (Bankr. E.D. Wis. 1984)). In its broadest
20 sense, 2004 examinations are referred to as a "fishing expedition." *In re Bennett Funding*
21 *Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D. N.Y. 1996). Such examinations are not intended to
22 be abusive, but instead provide opportunities for "discovering assets, examining transactions,
23 and determining whether wrongdoing has occurred." *In re Washington Mutual, Inc.*, 408 B.R.
24 at 408 B.R. 45, 50 (Bankr. D. Del. 2009), citing *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr.
25 S.D. N.Y. 2002). Accordingly, no contested matter or adversary proceeding need be instituted
26 as a prerequisite to conducting an examination under Rule 2004.

27 Accordingly, the Trustee requests issuance of an order requiring Buerck to produce
28 documents in response to Exhibit A no later than 15 days subsequent to service of the Court's

1 order granting this Application, and to appear for examination via video conference or such
2 other method as may be agreed upon by the parties at a mutually agreed upon date but no later
3 than 14 days after production of the documents. As the Trustee has a pending motion to convert
4 this case to a Chapter 7, this application and the related order shall provide authority for the
5 Trustee or the Chapter 7 trustee to conduct the examination.

6 Dated: January 18, 2021

FINESTONE HAYES LLP

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8 /s/ Stephen D. Finestone
9 Stephen D. Finestone
Attorneys for Kyle Everett

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EXHIBIT A

Instructions and Definitions

A. **“Document”** and **“Documents”** shall have the same definition as contemplated by the Federal Rules of Civil Procedure 26 or 34, including, without limitation, all papers, writings, and records of every type and description, all written, recorded and graphic matter of every type and description, contracts, receipts, buy orders, canceled checks, drafts, invoices, statements, memoranda, corporate minutes, bulletins, intra- and interoffice communications, books of account, worksheets, desk diaries, appointment books, expense accounts, recordings, notes of conversations, notes of meetings and conferences, telegraphic communications, stock certificates, pamphlets, schedules, studies, books, computer printouts, reports, photographs, maps, charts, photographic records, tapes, transcriptions of tapes, and any other device or medium on or through which information of any type is transmitted, recorded, or preserved. The term “document” also encompasses all matters, instruments or other means of electronic storage or other forms of media, including e-mails and other electronically stored information. The term “document” also means every copy of a document where such copy is not an identical duplicate of the original.

B. The term “**Communication(s)**” or “**Communication(s)**” includes any contact, regardless of method between two or more persons, organizations, companies or other business entities, regardless of form, and shall include, without limitation, meetings, conferences, negotiations, telephone conversations, text messages or any other form of verbal or written exchange of information in the form of facts, ideas, inquiries, or otherwise.

C. The term "**Buerck**" means Brett Buerck or entity owned or controlled by Buerck or any agents and anyone else acting on his behalf.

D. The term “**Debtor**” means Benja Incorporated and any of its officers, directors, shareholders, employees, agents, lawyers, as well as any related entities that are or were owned by Debtor and any predecessors or successors in interest, including EPHE Corp and any person acting on their behalf.

1 E. The term “**Chapin**” means Andrew Chapin and any of his employees, agents,
2 lawyers or anyone acting on his behalf.

3 **DOCUMENTS TO BE PRODUCED**

4 1. All Documents concerning any investment made by Buerck in the Debtor.

5 2. All Communications regarding any investment in the Debtor, including but not
6 limited to, emails and text messages to the Debtor.

7 3. All Communications regarding any loans by Buerck to the Debtor.

8 4. All Communications with the Debtor or anyone acting on its behalf.

9 5. All Communications with Chapin.

10 6. All Communications with Thomas Goode.

11 7. All Documents evidencing any funds Buerck received from the Debtor, including
12 but not limited to, checks, wire information and any Documents or Communications
13 in connection therewith.

14 8. Documents evidencing any demands for payment from the Debtor.

15 9. All Communications with any creditor of the Debtor.